

1 IN THE UNITED STATES DISTRICT COURT  
2 IN AND FOR THE EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA, )

4 Plaintiff, )

NO. 2:10-CR-2077-RMP-1

5 -vs- )

6 JAMES DEAN CLOUD, )

7 Defendant. )

March 1, 2011

Yakima, Washington

9  
10 AMENDED VERBATIM REPORT OF PROCEEDINGS  
11 SENTENCING

12 BEFORE THE HONORABLE ROSANNA MALOUF PETERSON  
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 FOR THE PLAINTIFF:

JAMES A. GOEKE  
Assistant U.S. Attorney  
402 E. Yakima Ave.  
Yakima, WA 98901

16 FOR THE DEFENDANT:

ALEX B. HERNANDEZ  
Attorney at Law  
306 E. Chestnut  
Yakima, WA 98901

17  
18  
19  
20 REPORTED BY:

Lynette Walters, RPR, CRR, CCR  
Official Court Reporter  
P. O. Box 845  
Yakima, WA 98907  
(509) 573-6613

21  
22  
23 Proceedings reported by mechanical stenography; transcript  
24 produced by computer-aided transcription.  
25

## **Errata Sheet**

Case Name:

Case Number:

The following correction(s) has been made:

by: \_\_\_\_\_  
Official Court Reporter

Date: \_\_\_\_\_

1 (MARCH 1, 2011, 9:12 A.M.)

2 THE COURT: The matter before the court is  
3 United States versus James Cloud, Case No. CR-10-2077. This is  
4 the time set for sentencing.

5 Mr. Goeke.

6 MR. GOEKE: Good morning, Your Honor.

7 THE COURT: Mr. Hernandez.

8 MR. HERNANDEZ: Good morning, Your Honor.

9 THE COURT: Mr. Cloud.

10 THE DEFENDANT: Good morning.

11 THE COURT: Good morning.

12 There are a couple of issues that I would like to  
13 review before I hear from counsel in this matter.

14 First of all, Mr. Cloud, I want to make sure that you  
15 have had an opportunity to read the presentence investigation  
16 report, and that you had an opportunity to review that with  
17 Mr. Hernandez. In addition, I want to make sure that you have  
18 seen the amended report, and I want to discuss some of the  
19 objections that were filed on your behalf.

20 Specifically, let's go to Objections 1, 2, 3, which  
21 are that the warrants -- and this refers to the presentence  
22 report in paragraphs 120 to 123 on page 20 of the PSI. The  
23 defendant's objection is that the information relating to the  
24 active warrants out of Las Vegas, Nevada, did not pertain to  
25 you. I agree with you, and I will have that information

1 stricken from the presentence report. So to that extent, I am  
2 granting -- I suppose it's granting the objection. The report  
3 will be amended to that.

4 THE DEFENDANT: Thank you.

5 THE COURT: Objection No. 2, in addition, referred to  
6 reference of being in state custody, and you indicated that that  
7 was tribal custody. Even though it does not affect any of the  
8 sentencing range, I do agree with you on that also, and will  
9 grant that that be corrected. I believe that actually is  
10 already corrected in the amended presentence report.

11 MR. HERNANDEZ: That's correct, Your Honor.

12 THE COURT: The objection -- and, Mr. Goeke, have you  
13 received anything from the victim as far as restitution?

14 MR. GOEKE: I have not, Your Honor. I spoke to a  
15 member of the Probation office about this issue, and my  
16 understanding was that the victims were going to provide the  
17 impact statement to probation prior to the sentencing, but I  
18 have not seen an updated copy of that. That's the only issue,  
19 frankly, from the government's perspective, with the issue of  
20 restitution, as to whether that number has been finalized or  
21 not. If it hasn't, the government would request additional time  
22 to perfect that number, which will not affect the sentencing  
23 proceeding today.

24 THE COURT: I have talked to Probation this morning.  
25 The victim has not provided any documentation, so I will agree

1 with the defense that that issue has not been proved. I will  
2 not grant additional time for the restitution. So, therefore, I  
3 will reduce by one level the offense level. The victim had  
4 adequate notice, had been contacted repeatedly by Probation, did  
5 not provide any documentation, although the victim had indicated  
6 that he had received that documentation, but did not complete  
7 it.

8 MR. GOEKE: I would just ask the court to inquire if  
9 there's anyone present today who's a victim. I'm not aware of  
10 anyone who is, but if there's someone in the gallery.

11 THE COURT: Is there anyone present today who's a  
12 victim of this case involving James Cloud? I see no one raise  
13 their hands.

14 Mr. Goeke, do you want to be heard more on this?

15 MR. GOEKE: There is a provision under 18 United  
16 States Code, Section 3664, if the amount of restitution is not  
17 readily cognizable by the time of sentencing, to allow the court  
18 to set a date for final determination of the victim's losses.  
19 That would be 3664(d) -- subsection (d)(5). I would ask the  
20 court do that and the allow the victims another opportunity to  
21 provide the victim impact statement to determine the loss. That  
22 would not hold up the sentencing proceeding today, and it would  
23 just allow them to -- there's no question there was a loss here.  
24 I don't know the reason for them not providing a statement to  
25 Probation, but I believe it would be appropriate for the court

1 to extend additional time for them to provide the court with  
2 notice of what their total loss was.

3 THE COURT: Mr. Hernandez?

4 MR. HERNANDEZ: Your Honor, I guess for purposes of  
5 today's proceedings, the enhancement can't be applied, and it's  
6 our position it can't be applied, because the information hasn't  
7 been provided. And I think the court has ruled on that.

8 As far as another hearing to assess whether or not --  
9 the amount of the restitution, Your Honor, I think that's  
10 permitted by statute. Mr. Cloud doesn't have to be present for  
11 that, I don't believe, and it's not going to hold up today's  
12 proceedings.

13 So the statute provides for that, Your Honor. If the  
14 court wishes to set this matter for a restitution hearing at a  
15 later date, then so be it. But as the court indicated, there's  
16 been plenty of time, and they've been in contact with the victim  
17 on several occasions. I don't know why they would not have  
18 provided that.

19 THE COURT: This offense did occur May 25, 2010.

20 MR. GOEKE: It did, Your Honor.

21 THE COURT: I will not grant the continuance on the  
22 restitution issue. I think there has been sufficient  
23 opportunity, and that information has not been forthcoming.

24 I think, then, am I correct in saying the total  
25 offense level now is 24, criminal history category -- the score

1 was 17 points, so criminal history category is VI.

2 MR. GOEKE: I think that's right, Your Honor.

3 THE COURT: Mr. Goeke, do you need a minute to review?

4 MR. GOEKE: I think it would be a one-point reduction.

5 THE COURT: Okay. So the statutory provisions for  
6 Counts 1 and 2 would be that incarceration could be 10 years on  
7 either of those. Guideline provisions are 110 to 137 months.  
8 Supervised release, under the statute, would be three years on  
9 Count 1 or Count 2.

10 Miss Dykstra, is this the victim?

11 MS. DYKSTRA: No, Your Honor.

12 I just wanted to address briefly the offense  
13 computation.

14 THE COURT: Oh, thank you. Please.

15 MS. DYKSTRA: I think that the one-point reduction  
16 does not affect the total offense level, because we're talking  
17 about a multiple-count calculation.

18 THE COURT: I see.

19 MS. DYKSTRA: And the adjustment that we were speaking  
20 of was in regard to Count 1.

21 THE COURT: Okay. Count 2 still carries the higher --

22 MS. DYKSTRA: The higher of the guideline ranges.

23 THE COURT: All right. Thank you for correcting that.  
24 I stand corrected. Total offense level remains 25, criminal  
25 history category is VI.

1           Guideline provisions for the sentencing range is still  
2   110 to 137 months. Supervised release is three years for Counts  
3   1 and 2. It's two to three years under the guideline range.  
4   Under the statute, the fine is up to \$250,000 on Counts 1 and 2.  
5   Under the guideline provisions, it would be \$10,000 to \$100,000.  
6   And there's a \$100 special penalty assessment per count, for a  
7   total of \$200.

8           I believe that addresses all of the objections. And  
9   with those corrections, I will adopt the presentence report as  
10   my findings of fact.

11           Mr. Hernandez, I will hear from you first, and then,  
12   Mr. Goeke, and then Mr. Hernandez again.

13           MR. HERNANDEZ: Thank you, Your Honor.

14           Your Honor, this case involves two very serious  
15   charges, burglary of a residence, and possession of stolen  
16   firearms. There's no question that these offenses are serious,  
17   and we recognize that. And so does Mr. Cloud. I think,  
18   Your Honor, in trying to fashion a sentence in this particular  
19   case, at first blush I think both Mr. Goeke and I were trying to  
20   figure out what was going on in Mr. Cloud's life. And as a  
21   result of that, we were able to obtain some information and work  
22   towards a resolution of this case via a Rule 11(c)(1)(C) plea to  
23   some modified charges in this case.

24           The sentence we're requesting for both charges is 150  
25   months, which is significant. It's the most time that Mr. Cloud



1 would have spent incarcerated. And as the court can see from  
2 his criminal history, he's been incarcerated for significant  
3 periods of his life, commencing at a very young age.

4 But what the court has been able to learn about  
5 Mr. Cloud since this process began is that he's a young man who  
6 has had a very troubling upbringing, Your Honor. It's one  
7 that's been full of neglect, abuse, substance abuse, emotional,  
8 all kinds of abuse, Your Honor. And that's alluded to in my  
9 sentencing memorandum, as well as Dr. Young's report.

10 There's no question that Mr. Cloud is, as a result of  
11 this upbringing, is before this court, at least my mind.  
12 Essentially, he's been in a survival mode at a very young age.  
13 And, so, because of that, the early onset of using drugs and  
14 alcohol in his life, he's been in continual use of those  
15 substances and trying to support those habits. I think I  
16 pointed out to the court that many of his convictions are  
17 property-related crimes, which, as the court is aware, in the  
18 court's experience, is that is pretty standard for somebody  
19 who's addicted to drugs, to try to go and steal property, sell  
20 it, and try to get money, and go back to using.

21 Mr. Cloud, Your Honor, has had a learning disability  
22 that's affected him as a young boy, and now, even now, still has  
23 a low intellectual abilities. His cognitive abilities were  
24 impacted based on alcohol abuse as a young, as a young boy.  
25 And, so, he really didn't have a chance to participate in

1 school, also because of the transient nature of his life, and  
2 learn something, and do something with his life.

3 He has indicated to me that he has had the opportunity  
4 to obtain his GED. He's short of -- just short of obtaining  
5 that. And that's one of his goals when he gets into the Bureau  
6 of Prisons.

7 Your Honor, I could go on forever about what's gone on  
8 in Mr. Cloud's life. I think I've set that forth pretty clearly  
9 in my sentencing memorandum. And I think Dr. Young's report  
10 speaks volumes.

11 I'd be more than happy to answer any more questions,  
12 Your Honor, but I think, given Mr. Cloud's history, and  
13 considering the 3553 factors in this case, that sentence is  
14 appropriate, and we would ask the court to follow the  
15 recommendation.

16 THE COURT: I do have one question. It doesn't relate  
17 to what you've talked about, but in the 11(c)(1)(C) there was a  
18 requirement or an agreement that, after any period of  
19 incarceration, that Mr. Cloud impose in-patient substance abuse  
20 treatment for a period of 6 to 12 months to follow the  
21 defendant's sentence of incarceration as a term of the three  
22 years of supervised release. I certainly don't disagree  
23 substance abuse treatment would be appropriate, but I am  
24 informed by Probation that it is unlikely, after such a lengthy  
25 period of incarceration, that any treatment facility would

1 accept him for in-patient treatment because they would view the  
2 term of incarceration as a period of sobriety; thus, cancelling  
3 any need for in-patient substance abuse treatment.

4 MR. HERZNANDEZ: I think, Your Honor, in discussing  
5 that part of the resolution in this case with Mr. Goeke, that I  
6 had discussed that -- I don't know if that very issue, but the  
7 issue as to how things would be in 10 years. And what we had  
8 thought, and Mr. Goeke can also provide an answer to the court,  
9 is to leave that up to the discretion of the Probation office.

10 THE COURT: Okay.

11 MR. HERNANDEZ: So the reading of that condition would  
12 be as approved, or as -- to the discretion of the Probation  
13 office. That way it's -- Mr. Cloud isn't in violation as soon  
14 as he gets out of incarceration. That's not what we're trying  
15 to do, Your Honor.

16 THE COURT: All right. So you are basically amending  
17 the 11(c) (1) (C)?

18 MR. GOEKE: I think there's language in the agreement  
19 to reflect it permissive of the court now. If I'm wrong, we  
20 would amend it. Counsel is right. We discussed this. There  
21 are a number of variables between now and 150 months. Funding,  
22 for one, availability, space, all that sort of thing. So it  
23 would be incumbent on the agreement, before it could be  
24 effectuated, that the court is necessarily going to have  
25 discretion as to what actually happens with that provision of

1 the agreement.

2 That's what the parties would intend, and what the  
3 parties hope would occur. Obviously, it's going to be subject  
4 to the realities of Mr. Cloud's release.

5 THE COURT: Thank you.

6 Mr. Goeke, I will hear from you. Mr. Hernandez, if  
7 you and Mr. Cloud would take a seat.

8 MR. GOEKE: Thank you, Your Honor.

9 As the court is well aware, the defendant was facing,  
10 if this charge was -- or as this case could have been charged,  
11 the defendant would have been charged by the grand jury with  
12 possession of a firearm as a prohibited person. As the court is  
13 aware, there was video evidence of this exact fact. If he had  
14 been charged in that regard, he would have faced a mandatory  
15 term of 15 years, 180 months.

16 The parties have negotiated a resolution that the  
17 government believes is in the interests of Mr. Cloud, as well as  
18 the government. 150 months is a substantial sentence for  
19 Mr. Cloud. He's never faced this much time, by far. But given  
20 this criminal history, we believe it's appropriate. Something  
21 has to be done to break him of this history of criminality. But  
22 we're also understanding of his difficult past.

23 The evidence in this case was very clearcut. We could  
24 have proceeded to trial, proceeded to the grand jury with a  
25 superseding indictment alleging the felon in possession charge.

1 I don't believe there's much doubt that the jury would have  
2 returned a guilty verdict after viewing the videotapes of  
3 Mr. Cloud possessing two weapons.

4 So we believe this sentence is reflective of the  
5 defendant's difficult past, but it's also sufficient to protect  
6 the community, and, hopefully, to allow Mr. Cloud an opportunity  
7 to address his substance abuse issues, certainly, while he's  
8 incarcerated, and get his life on track.

9 So we'd urge the court to accept this agreement. It  
10 is a substantial sentence. It is higher than the guideline  
11 sentence for the charges to which he has pled guilty, but it is  
12 less than what he would have faced had he been convicted of  
13 felon in possession.

14 THE COURT: Thank you.

15 Mr. Hernandez, Mr. Cloud. Mr. Hernandez, is there  
16 anybody in the gallery who you want to have speak?

17 MR. HERNANDEZ: If I may have a moment, Your Honor.

18 THE COURT: Certainly.

19 (PAUSE)

20 MR. HERNANDEZ: Your Honor, Mr. Cloud's mother is in  
21 the courtroom, but she doesn't wish to address the court,  
22 Your Honor. This is a difficult moment for her.

23 THE COURT: Certainly. I understand.

24 Do you want to add anything, Mr. Hernandez, before I  
25 hear from Mr. Cloud?

1 MR. HERNANDEZ: I have nothing else to add,  
2 Your Honor.

3 THE COURT: Mr. Cloud, if there is anything that you  
4 would like to tell me, I would like to hear it.

5 THE DEFENDANT: I would.

6 THE COURT: Okay.

7 THE DEFENDANT: Well, actually, I don't know. I think  
8 I just got to take this time and learn to better my life, and  
9 try to get into any schooling I can. And hopefully I can keep  
10 motivated as far as job wise when I get out. That will be all.

11 THE COURT: Okay.

12 I find this case very difficult. I think this is a  
13 condemnation of society. I think society has failed Mr. Cloud  
14 in a number of ways, and I take no pride in having been a member  
15 of that society who did not provide some assistance and  
16 protection when it would have been meaningful.

17 I am pleased to hear you, Mr. Cloud, say that you're  
18 going to try and take this time to, I hope, finish your GED and  
19 get some other training. Somehow, in this agreement -- and I  
20 understand that this has been a deal wrought with peril, and a  
21 deal that is to try to ameliorate some of the criminal history  
22 that you have had. It's a significant amount of time, a longer  
23 period of time than I wonder is really warranted.

24 But I will follow the plea agreement. I will agree to  
25 impose a sentence of 150 months, 120 months for Count 1,

1 followed by a consecutive 30 months for Count 2, three years of  
2 supervised release for Count 1, three years of supervised  
3 release for Count 2, to run concurrent.

4 I will waive the fine. I am going to waive  
5 restitution. There has not been a showing made of the amount.  
6 There is a mandatory \$100 special penalty assessment per count,  
7 for a total of \$200 special penalty assessment.

8 I hope that somehow this incarceration period provides  
9 you some assistance that was not provided to you at previous  
10 times in your life. I'm concerned that your repeated criminal  
11 history is, in part, just to try to almost warehouse yourself so  
12 that you don't have to deal with the challenges of life. You  
13 are still a young man. You will still be a relatively young man  
14 when you are released from incarceration. If you are able to  
15 take this time to get some training, to be free of drugs, to  
16 learn some skill sets, some tools, gather some tools for dealing  
17 with the challenges that you're going to face when you get out  
18 of prison, then I hope that you will take those tools and really  
19 make a life for yourself that has been deprived up to this time.

20 I am going to impose some special conditions,  
21 including having you actively participate in a GED program, as  
22 directed by the supervising officer, if you are not completed  
23 with that by the time that you're out of incarceration;  
24 submitting your person, residence, office, or vehicle to a  
25 search conducted by the U.S. Probation officer at a sensible

1 time and manner based upon reasonable suspicion of contraband;  
2 completing a mental health evaluation, following any treatment  
3 recommendations of the evaluating professional, which do not  
4 require forced or psychotropic medication and/or in-patient  
5 confinement absent further order of the court, allowing  
6 reciprocal release of information between the supervising  
7 officer and treatment provider, and contributing to the cost of  
8 that treatment according to your ability to pay; undergoing a  
9 substance abuse evaluation and, if indicated by a licensed,  
10 certified treatment provider, entering into and successfully  
11 completing an approved substance abuse treatment program, which  
12 could include in-patient treatment and aftercare. You shall  
13 contribute to the cost of treatment according to your ability to  
14 pay, and allow full reciprocal disclosure between the  
15 supervising officer and the treatment provider.

16           You are ordered to abstain from use of illegal  
17 controlled substances, and you shall submit to urinalysis  
18 testing as required by the supervising officer, but no more  
19 frequent than six tests per month. You are ordered to abstain  
20 from alcohol and submit to testing, including urinalysis and  
21 Breathalyzer, as directed by the supervising officer, but no  
22 more than six times per month. And you shall not enter into or  
23 remain in any establishment where alcohol is the primary item of  
24 sale.

25           And you shall have no contact with the victim or any



1 member of his immediate family in person, by letter, or other  
2 communication devices, audio or visual devices, or through a  
3 third party, unless authorized by the supervising officer. You  
4 shall not enter the premises or loiter within 1,000 feet of the  
5 victim's residence or place of employment.

6 During those three years of supervised release, these  
7 conditions will serve as a hammer over your head, and if you  
8 violate any of those, especially any of the drug use or alcohol  
9 use, you could be reincarcerated up to a period of three years,  
10 without any credit for time served.

11 Mr. Hernandez, is there any reason I should not impose  
12 this sentence?

13 MR. HERNANDEZ: No, Your Honor.

14 THE COURT: Mr. Goeke?

15 MR. GOEKE: No, Your Honor. Thank you.

16 THE COURT: The sentence is imposed as outlined. I  
17 wish you luck. I hope that you will take advantage of your time  
18 in the federal facility, and take what it offers as much as  
19 possible. Good luck.

20 MR. HERNANDEZ: Your Honor, I had requested placement  
21 at Sheridan in my sentencing memorandum, if the court could  
22 recommend that.

23 THE COURT: I will certainly recommend that the inmate  
24 be placed at Sheridan. However, I do not control the Bureau of  
25 Prisons, so it's not authoritative.

1 Does Mr. Cloud want to ask you something?

2 MR. HERNANDEZ: If I could have a moment.

3 THE DEFENDANT: Well, why is that? I don't want to go  
4 there.

5 THE COURT: You don't want to go to Sheridan?

6 THE DEFENDANT: I would say I would be willing to go  
7 anywhere, but...

8 MR. HERNANDEZ: Go anywhere? I guess --

9 THE COURT: No recommendation.

10 MR. HERNANDEZ: -- no recommendation, Your Honor,  
11 except credit for time serve.

12 THE COURT: Credit for time served will be  
13 recommended.

14 Okay. Thank you.

15 MR. HERNANDEZ: Thank you, Your Honor.

16 (ADJOURNMENT AT 9:37 A.M.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 REPORTER'S CERTIFICATE

2  
3  
4  
5 I, LYNETTE WALTERS, Registered Professional Reporter,  
6 Certified Realtime Reporter, and Certified Court Reporter;

7 DO HEREBY CERTIFY:

8 That the foregoing amended verbatim report of  
9 proceedings, Pages 1 through 17, contains a full, true, complete  
10 and accurate transcription of my shorthand notes of all  
11 requested matters held in the foregoing captioned case,  
12 including all objections and exceptions made by counsel, rulings  
13 by the court, and any and all other matters relevant to this  
14 case.

15 DATED this 16th day of September, 2019.  
16  
17

18 s/ Lynette Walters  
19 LYNETTE WALTERS, RPR, CRR, CCR  
20 CCR NO. 2230  
21  
22  
23  
24  
25